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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
CORAM CAPITAL LLC,	:	Case No. 05-60169 (REG)
Debtor.	:	
In re:	:	Chapter 11
BERRY-HILL GALLERIES, INC.,	:	Case No. 05-60170 (REG)
Debtor.	:	

DEBTORS' EMERGENCY MOTION FOR INTERIM AND FINAL ORDERS (A) AUTHORIZING USE OF CASH COLLATERAL, (B) GRANTING ADEQUATE PROTECTION IN CONNECTION THEREWITH, (C) AUTHORIZING THE SALE OF CERTAIN WHOLLY-OWNED ARTWORK WITHOUT FURTHER COURT APPROVAL AND (D) DIRECTING THE TURNOVER OF CERTAIN COLLATERAL

Berry-Hill Galleries, Inc. ("Berry-Hill") and its affiliate, Coram Capital LLC ("Coram"), as debtors and debtors-in-possession (collectively, the "Debtors"), by their undersigned counsel, hereby submit this motion (the "Motion") for (a) entry of interim and final orders (i) authorizing non-consensual use of cash collateral pursuant to Section 363(c)(2)(B) of Title 11 of the United States Code (the "Bankruptcy Code"), (ii) granting adequate protection pursuant to Section 361 of the Bankruptcy Code, (iii) authorizing the sale of certain wholly-owned artwork without further Court approval and (iv) directing the turnover of certain collateral; and (b) scheduling a final hearing pursuant to Rule 4001 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"). In support of this Motion, the Debtors respectfully represent as follows:

SUMMARY OF RELIEF REQUESTED

1. As discussed more fully below, the Debtors have sought protection under chapter 11 of the Bankruptcy Code as a result of a series of disputes with Berry-Hill's current lender ACG Credit Company, LLC ("ACG" or the "Prepetition Lender") and Christie's Inc. ("Christie's"). These disputes have impaired Berry-Hill's liquidity and restricted its business operations.

2. Berry-Hill now seeks non-consensual use of ACG's cash collateral pursuant to Section 363(c)(2)(B) of the Bankruptcy Code. Absent access to adequate financing, Berry-Hill will not have sufficient liquidity to resolve these disputes expeditiously and sustain its normal business operations. To preserve the value of Berry-Hill's business and assets for the benefit of all creditors, equity holders and other parties-in-interest, approval of the use of cash collateral on the basis described below is critical. The use of cash collateral will in no way harm ACG because it is protected by a substantial equity cushion of over 300%.[1] Berry-Hill also will provide further adequate protection in the form of the monthly payment of interest and certain additional mandatory prepayments into a segregated account and the other protections described in paragraph 18 hereof.

[1] This amount is calculated without reference to the value of (i) claims, if any, against guarantors, (ii) the artwork that Berry-Hill properly sold to Coram on February 9, 2005 and (iii) artwork owned by third parties who have consigned such artwork to Berry-Hill to sell and respect to which Berry-Hill will be paid a commission.

3. Due to Berry-Hill's immediate need for access to working capital, Berry-Hill requests that the Court enter an interim order approving the cash collateral arrangements described herein (the "Interim Order").

JURISDICTION

4. The Court has jurisdiction over this Motion under 28 U.S.C. § 1334, which is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue of these proceedings is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

BACKGROUND

5. On December 8, 2005 (the "Petition Date"), the Debtors commenced their cases under chapter 11 of title 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York (the "Court"). The Debtors continue to operate their businesses and manage their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

6. Berry-Hill is descended from a gallery known as Berry of London. It or its predecessors have been owned and operated by members of New York's Hill family for over 100 years. Berry-Hill operates a world class art gallery specializing in 18^{th}, 19^{th} and early 20^{th} century American paintings. To a lesser extent, Berry-Hill also deals in contemporary American art, modern European paintings and Old Master paintings. Coram is a limited liability company, owned by the same individuals that own Berry-Hill, which was formed to invest in art and other investments.

7. In the ordinary course of their business, the Debtors buy and sell wholly- or partially-owned art works for their portfolios. Berry-Hill also sells works of art on consignment from other owners or, in the case of the contemporary art, often from the artists. It also acts as an art consultant or advisor to other investors in the fine art market. Most of the

paintings and sculptures that the Debtors deal in are museum quality works of art and many are valued in the hundreds of thousands or millions of dollars.

8. Berry-Hill's art collection is displayed at its showcase gallery at 11 East 70th Street, New York, New York, adjacent to the Frick Museum on 5th Avenue in Manhattan. Berry-Hill has 10 employees.

9. For the fiscal year ended December 31, 2004, Berry-Hill had gross sales of approximately $22,400,000. As of December 31, 2004 Berry-Hill's books and records reflected assets totaling approximately $34,000,000 and liabilities totaling approximately $42,000,000.[2]

A. Prepetition Credit Facility With Prepetition Lender

10. Since 2003, Berry-Hill's business has been financed through a term loan facility (the "Prepetition Credit Facility") provided by ACG of $20,150,000 of which, as of the Petition Date, approximately $19,772,827 remained outstanding. ACG's loan, which matured by its terms on December 5, 2005, is secured by a lien on substantially all of Berry-Hill's assets, including (a) four paintings in the possession and control of ACG, (b) Berry-Hill's interest in its other owned artwork, (c) a $9 million recorded mortgage on the real estate owned by Berry-Hill and (d) a $5 million unrecorded mortgage on the real estate owned by Berry-Hill (collectively, the "Collateral"). Berry-Hill's owned artwork has recently been appraised at a value in excess of $50 million and its owned real estate at a value of $21 million. Accordingly, ACG is in a substantially oversecured position.

B. Litigation with ACG and Other Circumstances Surrounding the Chapter 11 Filings

11. The Debtors' bankruptcy filings result from a series of disputes with their lenders and with the auction house, Christie's. These disputes have impaired the Debtors'

[2] Artwork is valued at the lower of cost, using the specific identification method, and market. Accordingly, book value of assets does not reflect significant appreciation of artwork.

liquidity and interfered with Berry-Hill's efforts to refinance the Prepetition Credit Facility and to conclude advantageous purchases and sales of artwork.

12. The ACG litigation was commenced against the Debtors on August 24, 2005 in New York State Supreme Court. The complaint alleges that Berry-Hill breached the loan agreement (the "ACG Loan Agreement") executed by ACG and Berry-Hill in connection with the Prepetition Credit Facility by (1) failing to notify ACG that certain artworks had been moved to Christie's; (2) failing to preserve ACG's rights in artworks securing the debt owed to ACG; (3) failing to remain the sole owner of the artworks securing the debt owed to ACG; (4) incurring additional indebtedness; and (5) failing to deliver timely inventory reports.

13. The Debtors dispute all of the allegations, and believe that the litigation is a misguided attempt by an overaggressive lender to put Berry-Hill out of business based on perceived misdeeds and its desire to punish Berry-Hill for doing business with ACG's former executives. The litigation emanated from a dispute between two non-debtors, Ian Peck, the President and a principal of ACG, and Andrew Rose, a former colleague of Ian Peck who subsequently left ACG and formed ARCK Credit Company, LLC ("ARCK"), which provided the $8.5 million of funding to finance Coram's purchase of 45 paintings from Berry-Hill. The litigation is particularly egregious as (a) the loan is substantially secured by collateral valued at more than three times the principal loan balance, and (b) Berry-Hill remained current on its monthly interest payments throughout the term of the loan which bears interest at a substantially above-market rate of 11.5%.

14. The ACG litigation, the related disputes with Christie's and other significant events leading to the filing of the Debtors' Chapter 11 cases are described in more detail in the Declaration of Alan M. Jacobs, pursuant to Local Bankruptcy Rule 1007-2, filed

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with this Court and incorporated herein by reference.[3] The filing of these Chapter 11 cases provides the Debtors with relief from the litigation and allows them to pursue the necessary financing to satisfy their obligations in an orderly fashion under the protections of the Bankruptcy Code.

PROPOSED USE OF CASH COLLATERAL

A. The Critical Need for Use of Cash Collateral

15. Berry-Hill's reorganization efforts require access to working capital, and specifically, access to the cash proceeds of the sale of the Collateral and the cash generated from other business activities (collectively, the "Cash Collateral").[4] Use of Cash Collateral is necessary first to provide Berry-Hill with the liquidity necessary to operate in the ordinary course and restructure its affairs. As of the Petition Date, Berry-Hill had approximately $1.5 million in cash on hand ("Cash on Hand").[5] Access to cash on hand and future Cash Collateral is needed to ensure Berry-Hill's ability to purchase artwork in its discretion, pay employees, condominium fees and utilities, and to otherwise fund its business in the ordinary course. In addition, art galleries such as Berry-Hill require sufficient liquidity to satisfy their ongoing cash requirements and maintain their reputation in the marketplace. In order to preserve the value of Berry-Hill's

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[3] Immediately prior to the Petition Date, Mr. Jacobs was retained as the Debtors' Chief Restructuring Officer. As such, Mr. Jacobs will have complete oversight and responsibility for, among other things, all finance and accounting functions.

[4] Berry-Hill has also solicited and received several proposals for debtor-in-possession financing on a priming basis. As of the Petition Date, Berry-Hill had negotiated and documented a DIP facility with a very credible and experienced financing source. However, the Debtors ultimately determined that, in their business judgment, the use of the Cash Collateral as set forth herein would be in the best interest of the estates and their creditors.

[5] Substantially all of the cash on hand is proceeds of the sale of consigned art which is not subject to ACG's liens. Furthermore, Berry-Hill's cash is not subject to any control agreement, and accordingly, at best, the cash on hand would be subject to an avoidable unperfected lien. *See U.C.C. §§ 9-312(b) and 9-315(c) & (d).* Accordingly, Berry-Hill seeks a finding that the Cash on Hand does not constitute ACG's collateral and is available for use by Berry-Hill in the operation of its business. Additionally, cash received post-petition with respect to art consigned to Berry-Hill, whether consigned pre-petition or post-petition, is not ACG's Cash Collateral. *See* Debtors' Motion for an Order Authorizing the Debtors to Continue Performing their Obligations under Prepetition Consignment Arrangements, et al., filed on the same date as this Motion.

business, Berry-Hill must demonstrate to its customers, collectors and artists who deliver works for sale on consignment, and auction houses, that Berry-Hill has sufficient liquidity to meet its obligations.

16. Absent immediate access to Cash Collateral, Berry-Hill anticipates that it would encounter a severe disruption in its business. Berry-Hill has determined that the proposed use of Cash Collateral is vital to the Debtors' ability to operate in Chapter 11 and for the Debtors' successful reorganization. Without access to Cash Collateral, Berry-Hill will be unable to meet its working capital needs, interrupting its ability to buy and sell artworks, meet customer obligations, obtain continued trade credit, and attract new business, all of which will severely and irreparably damage its enterprise and diminish the prospects for a successful reorganization. Use of Cash Collateral is the only available source of adequate funds to meet such needs.

17. For the reasons set forth above, to meet its financing requirements and facilitate a successful reorganization, in connection with their restructuring efforts the Debtors recognized the need for Cash Collateral. Because the liens of the Prepetition Lender encumber substantially all of Berry-Hill's assets and the Prepetition Lender has not consented, Berry-Hill seeks non-consensual use of Cash Collateral pursuant to Section 363(c)(2)(B) of the Bankruptcy Code. As described above, Berry-Hill concluded in its sound business judgment, and after investigating and soliciting other sources of financing, that seeking approval of the use of Cash Collateral under the terms set forth herein, was the most reasonable solution under the circumstances and addressed the Debtors' reasonably foreseeable working capital needs without unnecessarily burdening the estate with an additional layer of secured debt.

B. Overview of the Cash Collateral Terms

18. Berry-Hill is seeking authority to use cash (in addition to the Cash on Hand) that arguably constitutes the Prepetition Lender's Cash Collateral. As is standard for the

use of cash collateral (whether consensual or non-consensual), Berry-Hill must demonstrate that the Prepetition Lender is adequately protected for the diminution in the value of such collateral as a result of such use. Berry-Hill submits that the estate's burden on adequate protection is easily satisfied here because in addition to the substantial 300% equity cushion enjoyed by the Prepetition Lender, Berry-Hill is also prepared to provide the following additional adequate protection[6]:

- Berry-Hill shall continue to make monthly interest payments on the remaining outstanding principal loan amount under the Prepetition Credit Facility, at the non-default interest rate set forth in the ACG Loan Agreement of 11.5% per annum, to be paid into a segregated account, to be held subject to the claims and interests of ACG (the "Segregated Account);[7]
- Berry-Hill shall pay into the Segregated Account 50% of the net cash proceeds (after payment of expenses and the balance of any unpaid purchase price for the sold art work) from the sale of any wholly-owned artwork;
- Any sale of Berry-Hill's wholly-owned artwork at a price that is less than the minimum prices listed on Exhibit A annexed hereto shall be subject to ACG's consent or Court approval;
- In the event of a sale or refinancing of Berry-Hill's owned real estate, 100% of the net proceeds of such sale shall be paid into the Segregated Account, provided that Court or ACG consent shall be required only if such net proceeds are less than $12 million;
- ACG shall be granted replacement liens on Berry-Hill's post-petition collateral;

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[6] Ultimately the Prepetition Lender will only be entitled to receive adequate protection to the extent that ACG can demonstrate an actual diminution in the value of its interest in the collateral as a result of the use of such collateral during the course of the case.

[7] If ACG was a more traditional lender like a commercial bank such periodic payments would typically be made to the lender. However, because Berry-Hill has substantial affirmative claims that it intends to assert against ACG, payment into a segregated account minimizes the risk to the estate of having to seek disgorgement of amounts actually paid to ACG during the course of the Chapter 11 case. Further, Berry-Hill disputes ACG's claims that the outstanding balance includes legal fees and default interest, bringing ACG's claimed balance to in excess of $21 million.

- Cash Collateral shall only be used in accordance with a budget annexed hereto as Exhibit B.[8]

19. The Debtors believe that the Cash Collateral terms are more than reasonable and fair under the circumstances and, therefore, obtaining the use of Cash Collateral serves the best interests of the Debtors, their creditors and their estates.

C. The Prepetition Lender is Adequately Protected

20. Prior to granting the use of cash collateral, this Court must find that the secured creditor consents to such use or is otherwise adequately protected. 11 U.S.C. § 363(c)(2). Section 361 of the Bankruptcy Code provides that adequate protection can be provided by, among other things, the making of periodic cash payments, the granting of replacement liens, or the granting of such other relief as will provide the indubitable equivalent in such property. 11 U.S.C. § 361 (2005). Numerous courts have held that the existence of an "equity cushion" alone constitutes adequate protection. *In re Elmira Litho, Inc.*, 174 B.R. 892, 904 (Bankr. S.D.N.Y. 1994) ("An equity cushion . . . provides adequate protection if it is sufficiently large to ensure that the secured creditor will be able to recover its entire debt from the security at the completion of the case.").

21. The term "equity cushion" generally refers to the excess in value of collateral over the amount of a creditor's secured claim. *Contrarian Funds, LLC v. Westpoint Stevens, Inc.*, 2005 U.S. Dist. LEXIS 28153, at *49, n. 20 (S.D.N.Y. November 16, 2005). The appropriate method to use when determining the amount of an equity cushion is fair market value. *In re Houston,* 32 B.R. 584, 587 (Bankr. S.D.N.Y. 1983) ("In order for there to be an 'equity cushion' there must be a surplus of value remaining after the amount of the

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[8] Exhibit A and Exhibit B (each of which has been previously shared with ACG) shall be filed under seal because they contain sensitive pricing and other business information.

encumbrances against the property is subtracted from the fair market value of the collateral"); *see also In re QPL Components, Inc.*, 20 B.R. 342, 344 (Bankr. E.D.N.Y. 1982) ("The value to be accorded collateral which is inventory of an ongoing Chapter 11 debtor, with reasonable prospects that it can continue, is the dollar value realizable from its disposition in the ordinary course of business").

22. Here, the value of Berry-Hill's collateral base exceeds $71 million. Specifically, Berry-Hill owns its gallery space and a corporate apartment located in a townhouse, just off of Fifth Avenue and immediately adjacent to the Frick Museum. These interests have recently been appraised as having a value of $21 million. The fair market value of Berry-Hill's portfolio of owned artwork, moreover, has also recently been appraised in excess of $50 million. When compared to the outstanding amounts under the Prepetition Credit Facility of approximately $19.75 million, the value of the assets represents more than three times the amount of such indebtedness[9]. Such a sizeable equity cushion, alone, provides ample adequate protection to the Prepetition Lender. *See In re Mellor*, 734 F.2d 1396, 1401 (9th Cir. 1984) (equity cushion of 20% is adequate protection for secured creditor); *In re Shapiro*, 109 B.R. 127, 135 (Bankr. E.D. Pa. 1990) (30% equity cushion is adequate protection); *In re McKillips*, 81 B.R. 454, 458 (N.D. Ill. 1987) (equity cushion of 20% or more almost always constitutes adequate protection); *In re San Clemente Estates*, 5 B.R. 605, 610 (Bankr. S.D. Cal. 1980) (65% equity cushion sufficient to protect creditor).

23. Even though the equity cushion is more than sufficient to protect ACG's liens, Berry-Hill has offered to provide ACG with several additional forms of adequate

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[9] Even based on ACG's disputed claim that the obligations owed to it by Berry-Hill exceed $21 million after inclusion of default interest and legal fees, the equity cushion would still be more than 3 times the amount of the indebtedness.

protection. First, Berry-Hill proposes to make monthly payments into the Segregated Account for the benefit of the Prepetition Lender at the contractual rate of interest under the ACG Loan Agreement of 11.5% (approximately $195,000 per month). *See* 11 U.S.C. 361(1). Second, Berry-Hill will make a mandatory prepayment into the Segregated Account for the benefit of ACG in an amount equal to 50% of the net cash proceeds (after payment of expenses and the balance of any unpaid purchase price) of the sale of any wholly-owned artwork of Berry-Hill. This mandatory prepayment provision provides the Prepetition Lender with additional comfort that it is adequately protected. Furthermore, sales of artwork will be subject to minimum pricing requirements based on ACG's own appraised values. Moreover, in the event of a sale or refinancing of Berry-Hill's valuable owned real estate, 100% of the net proceeds of such sale will be paid into the Segregated Account and the consent of ACG or the Court will be required if such net proceeds shall be less than $12 million. Also, ACG shall be granted replacement liens on Berry-Hill's post-petition collateral. *See* 11 U.S.C. § 361(3). Finally, all Cash Collateral will be utilized pursuant to the budget annexed hereto as Exhibit B (the "Budget"), subject to a 10% variance and a week-to-week carryover of unused amounts. The Budget will be administered by the Debtors' Chief Restructuring Officer, Alan M. Jacobs. To the extent there are variances from the budget in excess of the allowed variances, or if non-budgetary expenses arise, ACG will be provided with notice and an opportunity to object.

D. Use of Cash Collateral is Necessary

24. Berry-Hill proposes to use the Cash Collateral to meet its daily operating cash needs. Pursuant to § 363(c)(2) of the Bankruptcy Code, a debtor in possession may not use cash collateral without the consent of the secured party or court approval. 11 U.S.C. 362(c)(2). However, in the absence of consent to the debtor's use of the post-petition cash collateral, subsection (B) in section 363(c)(2) permits the court, after notice and a hearing, to authorize the

debtor to use cash collateral. *See, e.g., In re Pine Lake Village Apartment Co.*, 16 B.R. 750, 756 (Bankr. S.D.N.Y. 1982). Debtors are required to provide adequate protection in order for a court to authorize the use of cash collateral over a secured party's objection. *In re Lafayette Hotel P'shp.*, 227 B.R. 445, 453 (S.D.N.Y. 1998); *In re Dynaco Corp.*, 162 B.R. 389, 393 (Bankr. D. N.H. 1993). As one court explained:

> In reviewing an application under 11 U.S.C. § 363 which provides for the use of cash collateral, the Court must balance two irreconcilable and conflicting interests. The holder of a lien on cash collateral must not be left unprotected by unrestricted use of the collateral by the debtor. However, the purpose of Chapter 11 is to rehabilitate debtors and generally access to cash collateral is necessary in order to operate a business.

In re Stein, 19 B.R. 458, 459 (Bankr. E.D. Pa. 1982).

25. As explained above, a sufficient equity cushion exists to provide the Prepetition Lender with the requisite adequate protection. *See In re Realty Southwest Assoc.*, 140 B.R. 360, 366 (S.D.N.Y. 1992). While the equity cushion alone provides ample adequate protection, in an effort to avoid debate, Berry-Hill is prepared to provide additional adequate protection in the form of (a) post-petition interest payments, (b) mandatory prepayments from the net proceeds of sales of Berry-Hill's wholly-owned artwork and real estate, and (c) replacement liens.

26. Berry-Hill's need for use of Cash Collateral is immediate. Granting such relief will minimize disruption of the Debtors' businesses, serve to preserve the assets of the Debtors' estates, and is in the best interest of the Debtors, their creditors, and the estates. Absent immediate authorization for Berry-Hill to use Cash Collateral, the Debtors face significant danger of immediate or irreparable damage to the estates.

REQUEST FOR IMMEDIATE USE OF CASH COLLATERAL IS NECESSARY TO AVOID IRREPARABLE HARM

27. Pursuant to Bankruptcy Rule 4001(b)(2), a minimum of fifteen (15) days' notice is required before a final hearing on this Motion (the "Final Hearing") may commence. However, such Rule provides that the Court may conduct a hearing before such 15 day period expires, but may authorize the obtaining of credit and the use of only that amount of cash collateral necessary to avoid immediate and irreparable harm to the estate pending a final hearing. Fed. R. Bankr. P. 4001(c)(2).

28. As stated above, it is essential to the continued operation of the business that Berry-Hill be authorized by this Court to use cash collateral on an interim basis as set forth herein pending the Final Hearing. Berry-Hill has very little cash on hand. Funds are urgently needed to meet all of Berry-Hill's working capital and other liquidity needs, and to pursue the Chapter 11 cases in an orderly manner. In the absence of immediate use of Cash Collateral, the Debtors' attempts to reorganize would be immediately and irreparably jeopardized.

29. Berry-Hill believes that the terms and conditions of the use of the Cash Collateral represent the most favorable option for obtaining working capital and, for all of the foregoing reasons, are in the best interests of the Debtors and their creditors. Accordingly, the Debtors respectfully request that, pending the Final Hearing, Berry-Hill be permitted to use Cash Collateral, which usage would be subject to the terms and conditions described herein and in the attached proposed Interim Order.

30. As is apparent from the foregoing, the interim relief requested in this Motion, pending a final hearing, is necessary, appropriate and fully warranted, and is essential to avoid immediate and irreparable harm to the Debtors, their estates and their creditors.

SALE OF ARTWORK IN THE ORDINARY COURSE OF BUSINESS

31. As the Court is aware, one of the fundamental precepts of the Bankruptcy Code is to enable debtors to operate in the ordinary course to the greatest extent possible.

Because of the nature of Berry-Hill's business and client base, it has become clear to Berry-Hill that its sophisticated client base will insist on a finding from the Court that such sales are authorized and are free and claims of liens, claims and encumbrances. Rather than proceed via a section 363 process for each and every potential sale, Berry-Hill believes that it is appropriate to authorize it to sell wholly-owned artwork without further Court approval for sales of individual works of art at a price of less than $750,000 ("Ordinary Course Sales") provided such price is no less than the minimum amount listed on Exhibit A, to the extent applicable.

32. As described above, 50% of the net cash proceeds for any such Ordinary Course Sale will, if this Motion is approved, be paid into the Segregated Account. Berry-Hill believes that authorizing Ordinary Course Sales without Court approval will streamline its operations, avoiding the delay, expense and uncertainty associated with seeking Court approval for every sale of art in Berry-Hill's inventory. Use of these minimum price thresholds will protect ACG, since the prices are based on ACG's own estimation of value. For the most valuable art work in Berry-Hill's portfolio, those selling for $750,000 or more, Berry-Hill will separately seek Court approval.

TURNOVER OF PAINTINGS IN THE POSSESSION AND CONTROL OF THE PREPETITION LENDER

33. ACG currently has possession and control of four Berry-Hill paintings. Three of these paintings are so-called "core collateral," delivered to ACG in connection with the ACG Loan Agreement. By this Motion, the Debtors also seek an order pursuant to Section 542 of the Bankruptcy Code directing ACG to turnover these four paintings to the Debtors.

NOTICE WITH RESPECT TO THE INTERIM ORDER

34. The Debtors will provide notice by either hand delivery, electronic mail or facsimile of this Motion pursuant to Bankruptcy Rule 4001, to (a) the Office of the United States

Trustee, (b) the attorneys for the Prepetition Lender, (c) the Debtors' consolidated list of the twenty (20) largest unsecured creditors, and (d) the Debtors' equity security holders. The Debtors respectfully submit that such notice is sufficient, and request that this Court find that no further notice of the relief requested herein is required.

NOTICE WITH RESPECT TO THE FINAL ORDER

35. The Debtors also propose to serve a copy of the Interim Order and this Motion (together with exhibits) by hand delivery or overnight mail within three (3) days after entry of the Interim Order, upon (a) the Office of the United States Trustee, (b) the attorneys for the Prepetition Lender, (c) the Debtors' consolidated list of the twenty (20) largest unsecured creditors, (d) the District Director for the Internal Revenue Service and (e) all parties that have filed notices of appearance and requests for notices in the Debtors' Chapter 11 cases. The Debtors respectfully submit that such notice is sufficient, and request that this Court find that no further notice of the Interim Order, the Final Hearing, the final order approving the collateral arrangements described herein (the "Final Order") and all proceedings to be held in connection therewith is required.

36. The Debtors submit that no new or novel issue of law is presented with respect to the matters contained herein, and respectfully request that the requirement of a memorandum of law, pursuant to Local Bankruptcy Rule 9013-1(b), be waived.

37. No previous application for the relief sought herein has been made to this or any other court.

WHEREFORE, the Debtors respectfully request that the Court (i) enter the Interim Order authorizing Berry-Hill, *inter alia*, to use cash collateral on an interim basis; (ii) enter the Final Order authorizing Berry-Hill, *inter alia*, to use cash collateral on a final basis on the terms set forth herein; and (iii) grant such further relief as is just and proper.

Dated: New York, New York
December 13, 2005

KRAMER LEVIN NAFTALIS & FRANKEL LLP

/s/ Robert T. Schmidt

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